

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICTOR PODGORNYY,

No. C 04-5279 MEJ

Plaintiff,

vs.

**ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND**

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

In a Judgment and Order entered on July 29, 2005, this Court denied Plaintiff's motion for summary judgment and granted Defendant's cross-motion for summary judgment. The Court also denied Plaintiff's request that the claim be remanded based on new evidence. Now before the Court is Plaintiff's Motion to Alter or Amend Pursuant to Federal Rule of Civil Procedure ("FRCP") 59(e), filed on August 4, 2005. Upon review of Plaintiff's motion, the parties' briefing in support of and against the motion, relevant legal authority, and good cause appearing, the Court finds that it must deny Plaintiff's motion.

FRCP 59(e) authorizes a motion to alter or amend a judgment after its entry. Rule 59(e), however is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Amendment or alteration is appropriate under Rule 59(e) if: (1) the motion is "necessary to correct manifest

1 errors of law or fact upon which the judgment is based;" (2) the moving party presents "newly discovered
2 or previously unavailable evidence;" (3) the motion is necessary to "prevent manifest injustice;" or (4) there
3 is an "intervening change in controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir.
4 1999). This showing is a "high hurdle." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). A
5 judgment is not properly reopened "absent highly unusual circumstances." *Id.* This case presents no such
6 highly unusual circumstances.

7 In his motion for summary judgment, Plaintiff chose only to challenge the Commissioner's final
8 decision by arguing that what he claimed was new evidence required the Court to reverse the decision
9 and/or to remand for consideration of the new evidence. In the present motion, he raises additional
10 arguments - that the law of the case favored him, that a doctor's opinion had not properly been considered,
11 and that his obesity was overlooked. These, however, are precisely the types of arguments that may be
12 raised in a summary judgment motion. *See, e.g., Magallenes v. Bowen*, 881 F.2d 747 (9th Cir. 1989);
13 *Clem v. Sullivan*, 894 F.2d 328 (9th Cir. 1990). Plaintiff has cited no pertinent authority for his claim that
14 these issues may be raised for the first time in a motion to alter or amend. Accordingly, Plaintiff's arguments
15 are not persuasive.

16 In his reply brief, Plaintiff argues that the Court committed clear error because it improperly
17 determined that the ALJ had already considered Plaintiff's newly submitted evidence. However, regardless
18 of whether the ALJ considered the evidence, the Court set out specific reasons why it found that the
19 evidence would not have changed the ALJ's opinion. Order Denying Pl.'s Mot. Summ. J. and Granting
20 Def.'s Cross-Mot. Summ. J., July 29, 2005, 10:6-11:27. Accordingly, this argument is also unpersuasive.

21 For the foregoing reasons, Plaintiff's motion to alter or amend judgment is hereby DENIED.

22 **IT IS SO ORDERED.**

23
24 Dated: September 7, 2005

25 MARIA-ELENA JAMES
26 United States Magistrate Judge
27 
28